Five Heritage Sdn Bhd & Ors v Peguam Negara Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-5–01 OF 2017
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
10 AUGUST 2018

Civil Procedure — Judicial review — Leave to file judicial review application — Whether leave application frivolous and vexatious — Whether issues raised in substantive judicial review application were matters already raised in two pending suits by disputing parties before the High Court — Whether issues raised required a full trial with examination and cross-examination of witnesses and could not be summarily decided by mere examination of documents in a judicial review application

Constitutional Law — Attorney-General ('AG') — Extent of discretion — Whether AG did not enjoy unfettered discretion in civil law/public law matters — Whether AG's exercise of discretion in such cases subject to review by court to prevent abuse — Whether AG's decision whether or not to give consent under s 9 of the Government Proceedings Act 1956 akin to the decision of a public authority and amenable to judicial review

A dispute over whether two plots of land belonged to a public trust or to a valid private trust was the central issue in two High Court civil suits that were filed, respectively, by the appellants against the second and third respondents and vice-versa. The instant appeal concerned the decision by the first respondent ('the AG') to give his consent under s 9 of the Government Proceedings Act 1956 to the second and third respondents to proceed with their suit against the appellants. The appellants had applied to the High Court for leave to file a judicial review application to set aside the AG's decision to give his consent. The High Court refused leave holding that the application was frivolous and vexatious because: (a) the AG had absolute discretion whether or not to give consent and his decision could not be questioned or reviewed by the courts; and (b) the issues raised in the intended judicial review application were already pending determination in the aforesaid two High Court suits and were, in any event, not issues that could be summarily decided in a judicial review application. The instant appeal was against the High Court's decision.

Held, dismissing the appeal:

(1) The AG did not have unfettered discretion in respect of civil cases and to assert that his decision to give consent under s 9 of the Government Proceedings Act 1956 ('the GPA') was non-justiciable was a little extreme as, like any other public authority, the discretion given to the AG in a civil matter could not be free from legal restraint as there was no absolute discretion in public law. In a non-criminal matter, such as in the instant appeal, the court could exercise its judicial authority to ensure the power or discretion given by the law was not abused. The AG's consent, being a decision of a public authority, was susceptible to judicial review. The consent under s 9 of the GPA was not merely an administrative decision as it went to the party's locus to bring an action (see paras 15 & 13).

(2) The appellants in their judicial review application had sought, inter alia, a declaration that the Penang Burmese Trust created under the trust deed dated 31 July 2006 was a valid private trust. The High Court was right to hold that it was premature to seek such a relief as the issue could not be resolved simply by way of judicial review but required serious discussion and examination at a proper trial. Witnesses had to be called and each party had to be given the opportunity to ventilate its case. The issues could not be resolved by mere examination of the documents (see para 16).

(3) The application for leave was clearly frivolous and vexatious as there already existed two pending suits dealing with the same issues which had yet to be disposed of. The High Court was right in holding that the application did not justify further argument on a substantive motion (see paras 18–19).

[Bahasa Malaysia summary

Satu pertikaian tentang sama ada dua plot tanah dimiliki oleh amanah awam atau dimiliki oleh amanah persendirian merupakan isu penting dalam dua guaman sivil Mahkamah Tinggi yang telah difailkan, masing-masingnya, oleh perayu-perayu terhadap responden-responden kedua dan ketiga dan sebaliknya. Rayuan ini berkaitan keputusan oleh responden pertama ('KP') untuk memberikan persetujuannya di bawah s 9 Akta Prosiding Kerajaan 1956 kepada responden-responden kedua dan ketiga untuk meneruskan guaman mereka terhadap perayu-perayu. Perayu-perayu telah memohon kepada Mahkamah Tinggi untuk kebenaran memfailkan permohonan semakan semula agar mengetepikan keputusan KP untuk memberi persetujuannya. Mahkamah Tinggi menolak kebenaran itu dengan memutuskan bahawa permohonan itu adalah remeh dan menyusahkan kerana: (a) KP mempunyai budi bicara mutlak sama ada atau tidak untuk memberikan persetujuan dan keputusannya tidak boleh dipersoalkan atau disemak semula oleh mahkamah; dan (b) isu-isu yang ditimbulkan dalam permohonan semakan kehakiman yang diniatkan telahpun menunggu keputusan dalam dua guaman Mahkamah Tinggi tersebut dan adalah, dalam apa keadaan, bukan isu-isu yang boleh

A diputuskan secara terus dalam suatu permohonan semakan kehakiman. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara menolak rayuan tersebut:

B (1) KP tidak mempunyai budi bicara yang tidak terkawal berkaitan kes-kes sivil dan untuk menegaskan bahawa budi bicaranya untuk memberikan persetujuan di bawah s 9 Akta Prosiding Kerajaan 1956 ('APK') adalah tidak adil merupakan suatu yang agak melampau kerana, seperti mana-mana pihak berkuasa awam lain, budi bicara yang dberikan kepada C KP dalam suatu perkara sivil bukanlah bebas daripada sekatan undang-undang kerana tiada budi bicara mutlak dalam undang-undang awam. Dalam suatu perkara yang bukan jenayah, seperti dalam rayuan ini, mahkamah boleh menggunakan kuasa kehakimannya untuk memastikan kuasa atau budi bicara yang diberikan oleh mahkamah tidak D disalahgunakan. Persetujuan KP, yang merupakan keputusan pihak berkuasa awam, adalah terdedah kepada semakan kehakiman. Persetujuan di bawah s 9 APK bukan semata-mata keputusan pentadbiran kerana ia mempunyai locus pihak untuk memulakan tindakan (lihat perenggan 15 & 13).

E (2) Perayu-perayu dalam permohonan semakan kehakiman mereka telah memohon, antara lain, deklarasi bahawa Amanah Burma Pulau Pinang yang terbentuk di bawah surat ikatan amanah bertarikh 31 Julai 2006 adalah amanah persendirian yang sah. Mahkamah Tinggi adalah betul F untuk memutuskan bahawa ia adalah pramatang untuk memohon relief sedemikian kerana isu itu tidak boleh diselesaikan hanya melalui semakan kehakiman tetapi memerlukan perbincangan serius dan pemeriksaandi suatu perbicaraan yang sewajarnya. Saksi-saksi perlu dipanggil dan setiap pihak perlu diberikan peluang untuk G mengemukakan kesnya. Isu-isu tersebut idak boleh diselesaikan semata-mata dengan pemeriksaan dokumen (lihat perenggan 16).

(3) Permohonan untuk kebenaran adalah jelas remeh dan menyusahkan keran telahpun terdapat dua guaman yang menunggu keputusan dengan H isu-isu yang sama yang masih belum diselesaikan. Mahkamah Tinggi adalah betuk untuk memutuskan bahawa permohonan itu tidak mewajarkan huhaj selanjutnya berhubung usul yang substantif (lihat perenggan 18–19).]

I **Notes**

For a case on extent of discretion, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 2497.

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5993.

Cases referred to

Gouriet v Union of Post Office Workers and others [1977] QB 729, CA (distd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490; [2012] 1 CLJ 805, FC (refd)
Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107; [1990] Imm AR 1 (refd)
Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors [1988] 3 MLJ 149, SC (refd)
Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812, FC (refd)

Legislation referred to

Federal Constitution art 145(3)
Government Proceedings Act 1956 s 9
Rules of Court 2012 O 53, O 53 r 3(1)

Karin Lim Ai Ching (A Suppiah with her) (Juli & Ameleena) for the appellants.
Shamsul Bolhassan (Rosli Ahmad with him) (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.
T Gunaseelan (Balwant Singh and Ravin Veloo with him) (Balwant Singh & Co) for the second and third respondents.

Zaleha Yusof JCA:

[1] The appellants in this appeal are appealing against the decision of the High Court at Penang which had on 22 November 2016 dismissed their ex parte application for leave to make an application for judicial review under O 53 r 3(1) of the Rules of Court 2012.

[2] The application for leave for judicial review was basically against the consent given by the first respondent, the attorney general, to the second and third respondents under s 9 of the Government Proceedings Act 1956 ('the GPA') to proceed with proceedings commenced by the second respondent under the Originating Summons No 24 NCVC-1128–12 of 2014 ('OS 1128') in which the third respondent after successfully intervened, had been added as the second plaintiff.

A BACKGROUND FACTS

[3] The dispute herein revolves around a piece of land formerly known as Lot No 2103, Section 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran Pendaftaran No 61390 ('Lot No 2103'). The said Lot 2103 was originally part of a land known as Lot No 104, Section 4, Georgetown, North East District Penang held under Geran (first grade) No 6719 ('Lot 104'). Lot 104 with a temple erected thereon was originally given on trust to Burmese and Thai trustees for them to manage the temple for their community, with no power to, inter alia, sell, transfer or otherwise alienate the land and it was to remain and continue for the benefit of such community. The said trust was created by the East India Company on behalf of Queen Victoria on 30 May 1845.

[4] However on 16 April 1994 the trustees had entered into an agreement which was later endorsed by the court vide a court order dated 19 October 1994, to partition the trust property ie Lot 104 into two lots that is Lot 2102 to be taken by the trustee of the Thai community and Lot 2103 to be taken by the trustee of the Burmese community.

[5] The said lot 2103 had further been divided into two and now known as Lot No 10029 and Lot No 10030 respectively. The first appellant is currently the registered owner of Lot No 10029. The second to fifth appellants are the trustees of the Penang Burmese trust property for the Burmese community in Penang and the sixth appellant is the vice-chairman of the Penang Burmese Society.

[6] The second respondent claims to be the owner of the premise known as No 3, Burmah Lane, 10350 Penang which is now under Lot 10029. The first appellant had filed an action which is now pending at the Penang High Court registered as Civil Suit No PA-22NCVC-34–02 of 2016. In their defence and counterclaim, the first respondent averred that he need not deliver vacant possession of the said premise on the ground, inter alia, that the land involves a public trust under s 9 of the GPA and therefore cannot be sold and transferred without the consent of the attorney general and therefore the transfer and subdivision of lot 2103 is questionable.

[7] Subsequent thereto, the second respondent filed OS 1128. In OS 1128 the second respondent seeks to, inter alia, set aside the registration of the appellants as the owner of Lots 10029 and 10030 and permanent injunction to restrain the appellants from acting as the registered owners of the two lots which the second respondent alleges is a public trust property. After filing the OS 1128, on 20 August 2015, the second respondent wrote to the first respondent for his consent to proceed with OS 1128. On 31 May 2016, the

first respondent gave his consent which is now being opposed by the appellants herein.

THE HIGH COURT DECISION

[8] The appellants' application for leave to proceed with the judicial review was dismissed by the learned High Court judge as Her Ladyship agreed with the preliminary objection raised by the senior federal counsel that the application should be dismissed as it was frivolous, vexatious and did not justify further argument on a substantive stage. The followings are the reasons given by Her Ladyship:

> The applicants' main complaint is consent was given to the second and third respondents. It is submitted that the first respondent's decision to give consent is a non-justiciable issue. He then cited the case of *Gouriet v Union of Post Office Workers and Others* [1977] QB 729, wherein at p 730, the Court of Appeal held:
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> > (1) (per Lawton and Ormrod LJJ) 'That the Attorney General's exercise of his discretion to refuse his consent to the bringing of relator proceedings in his name could not be reviewed or questioned by the courts'.
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> Further down, at p 758, Lord Denning MR, states:
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> > It has been submitted that the discretion of the Attorney General is an absolute discretion which will not be inquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the court will not review it. That was made clear by the Earl of Halsbury LC in his oft-quoted dictum in *London Country Council v Attorney General in the House of Lords* [1902] AC 165, 168–169.
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> Based on the above authority, it is submitted that the 1st respondent's consent cannot be reviewed nor inquired by the court. I agree with SFC's submission. The right to give or refuse consent is within the absolute discretion of the Attorney General. In this case, the Attorney General had exercised his discretion to give the consent. The case law show the applicants cannot challenge the consent on whatever grounds. Therefore, there is no merits in the grounds relied upon by the applicants. The issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided by the courts in Suits 22 NCVC-34–02 of 2016 and Originating Summons No 24 NCVC-1128–12 of –2014. These issues cannot be resolved by way of judicial review. It is pre-mature at this stage for the applicants to ask the court to declare the Burmese Trust is a private trust. Each party should be given opportunity to prove its case. For the aforesaid reasons, I find the applicants' application is frivolous and vexatious. Accordingly, I dismiss the application with no order as to costs.

A OUR DECISION

[9] Before us, learned counsel for the appellants had argued that the first respondent's reliance on the case of *Gouriet v Union of Post Office Workers and others* [1977] QB 729, in making his preliminary objection that the discretion
B of the attorney general is an absolute discretion and therefore cannot be inquired into by the courts; and Her Ladyship's acceptance of the argument, was wrong. Unlike *Gouriet*'s, the appellant's application, did not relate to enforcement of criminal law by means of civil proceeding; but related to O 53
C of the Rules of Court 2012 and s 9 of the GPA.

[10] In her written submissions learned counsel for the appellants had cited the case of *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149 and the case of *Merdeka University*
D *Berhad v Government of Malaysia* [1982] 2 MLJ 243 to show that the attorney general is a public officer and also a public authority within O 53 of the Rules of Court 2012; and that the appellants had been adversely affected by the decision of the attorney general to give consent and as such the appellant had locus standi to challenge the decision of the attorney general.
E

[11] It was also argued on behalf of the appellants that the learned High Court judge was wrong to hold that the judicial review application was wrong as the only way to challenge the consent was by way of judicial review otherwise
F they will be precluded or estopped for raising the same objection when OS 1128 is heard.

[12] We had considered submissions made by the parties including the respondents' which submissions were similar with the decision of the learned
G High Court judge.

[13] We must admit that learned counsel for the appellants had a point when she contended that the consent of the attorney general, being a decision of a public authority is susceptible to judicial review. The consent under the said s 9
H in our view is not merely an administrative decision as submitted by learned counsel for the second and third respondents as it goes to the party's locus to bring an action.

[14] The purpose of judicial review is, inter alia, to ensure that public
I authority which exercises powers given by the law is kept within the confine of the powers conferred upon him. Its importance was clearly explained by Raja Azlan Shah Chief Judge (Malaya) (as His Highness then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135:

> Unfettered discretion is a contradiction in terms. ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene ...

[15] Article 145 cl (3) of the Federal Constitution provides that the attorney general shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a shariah court, a native court or a court martial. hence we agree that the attorney general has unfettered discretion in relation to prosecution of criminal offences based on the Federal Constitution. However in respect of civil cases we opine that he has no such unfettered discretion. In our view, to assert that the attorney general's consent under s 9 of the GPA is non-justiciable is a little extreme as like any other public authority, the discretion given to him in civil matter cannot be free from legal restraint as there is no absolute discretion in public law. See: *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169. A matter is non-justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. See *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812. Hence, in a non-criminal matter like in this appeal, the court can exercise its judicial authority to ensure the power or discretion given by the law is not abused.

[16] However, looking back at the decision of the learned High Court judge we fully agreed with the learned High Court judge that the issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided in Suit 22 NCVC-34–02 of 2016 and OS 1128. The appellants in their judicial review application had sought, inter alia, for a declaration that the Penang Burmese trust created under the trust deed dated 31 July 2006 is a valid private trust. We agreed with the learned High Court judge that it is premature to seek such a relief as the issue cannot be resolved simply by way of judicial review. The issues raised require serious discussion and examination at a proper trial. Witnesses need to be called and each party to be given opportunity to ventilate the issue and for the court to evaluate. It cannot definitely be exercised by mere examination of the documents.

[17] It is trite, that it is the function of the court in exercising its power to grant leave for judicial review to sieve through the application before it and determine that the application is not frivolous and vexatious and that there is an arguable case to merit further argument on the substantive motion. See: *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on*

Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490; [2012] 1 CLJ 805. The court must always bear in mind the following principles in respect of such an application:

(a) if it is clear to the judge that there is a point for further investigation on a full inter partes basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;

(b) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review;

(c) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and

(d) in exercising the powers in an inter partes leave application the test applicable by the court must be the same approach as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The court has to consider the facts and law before it and ask itself whether the court is satisfied that there is a case fit for further consideration or otherwise.

See: *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107; [1990] Imm AR 1.

[18] In the instant appeal we found that the application for leave was clearly frivolous and vexatious as there already existed two pending suits dealing with the same issues which until now have not been disposed off.

[19] Based on the above, we agreed with the learned High Court judge that the application did not justify further argument on a substantive motion. We therefore dismissed this appeal with no order as to cost.

Appeal dismissed.

Reported by Ashok Kumar